UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16804

ROBERT O. CLOUSER, *et al.*, as members of the Board of Zoning Adjustment, *et al.*, APPELLANTS

v.

KING DAVID, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 4, 1962

Mr. John R. Hess, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Chester H. Gray*, Corporation Counsel, *Milton D. Korman*, Principal Assistant Corporation Counsel, and *Hubert B. Pair*, Assistant Corporation Counsel, were on the brief, for appellants.

Mr. King David, appellee *pro se*, with whom *Mr. James H. Myrick* was on the brief.

Before EDGERTON, WASHINGTON and BURGER, *Circuit Judges*.

EDGERTON, *Circuit Judge:* The plaintiff David, a member of the bar, appealed to the Board of Zoning Adjustment of the District of Columbia for a "variance" to permit him to use his house, in a residential zone at 1916 Eleventh Street, Northwest, as a law office. The Board of Zoning Adjustment is authorized "Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical condi-

tions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan . . ." D.C. Code (1961) § 5-420(3), 52 Stat. 800.

The Board denied a variance and the plaintiff filed a complaint for injunctive relief against the Board. The District Court granted the plaintiff's motion for summary judgment, on the ground that the Board's action was in a legal sense arbitrary and capricious.

The neighborhood largely conforms with its present residential zoning, although some property is still used for commercial purposes in accordance with a regulation which permits a "nonconforming use" to continue when zoning is changed. The District Court pointed out that many neighbors favored the plaintiff's application and no one opposed it. The court disagreed with the Board's opinion that "relief cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan . . ." It appears to us that this opinion of the Board was reasonable and that the court erred in substituting its own opinion. We do not discuss the matter in detail because, regardless of this question, we think the plaintiff's motion for summary judgment should have been denied and the Board's motion for summary judgment granted.

The substance of the plaintiff's case was that he had spent $4,000 in "fixing up" the property, that unless he could maintain his law office there he would be "bankrupt

. . . out of business", and that the law office would cause no detriment. Such facts alone do not bring a case within the Board's authority to allow a variance. The practical difficulties or hardship to which the plaintiff is subjected must be due either to "exceptional narrowness, shallowness, or shape" of the property, or else to the property's "exceptional topographical conditions or other extraordinary or exceptional situation or condition". As the Board said in its opinion, "The lot is of normal size and shape, and the existing structure was erected as a dwelling and can be used for such with a minimum of cost for conversion." As the Board says in its brief, "Hardship, if any, has not resulted from the location, situation, or condition of the property, but solely from appellee's appropriation of it for commercial purposes without first having obtained the necessary change in zoning. To countenance such a procedure and standard for the procurement of a variance is to encourge the destruction of planned zoning in the District of Columbia."

Reversed.

Regulations Involved

Zoning Regulations of the District of Columbia, effective May 12, 1958:

Section 3101—R-1 District (One-Family Detached Dwellings) (Including R-1-A and R-1-B Districts)

• • • • •

3101.5 The following accessory uses incidental to uses permitted by this Section are permitted:

• • • • •

3101.52 Office of a physician or dentist residing on the premises, provided that:

(a) No goods, chattel, wares, or merchandise are commercially created, exchanged, or sold therein;

(b) Exclusive of domestics, not more than two persons who do not reside on the premises may be employed. Neither person employed shall be a physician or dentist; and,

(c) Only one sign not over one square foot in area and affixed to the dwelling is used. Such sign, if illuminated, shall be white and nonflashing.

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Section 3102—R-2 Districts (One-Family Semi-Detached Dwellings)

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3102.5 The following accessory uses or accessory buildings, incidental to the above uses are permitted:

3102.51 Any accessory use permitted in R-1 Districts under paragraph 3101.5 of this Article.

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Section 3103—R-3 Districts (Row Dwellings)

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3103.5 The following accessory uses or accessory buildings incidental to the above uses are permitted:

3103.51 Any accessory use or accessory building permitted in R-1 Districts under paragraphs 3101.5 or 3101.6 of this Article.

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Section 3104—R-4 Districts (Row Dwellings, Conversions, and Apartments)

3104.1 The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of such dwellings into dwellings for two or more families. Very little vacant land would be included within this district since its primary purpose would be the stabilization of remaining one-family dwellings. Since much of this district would lie within urban renewal areas as designated by the Redevelopment Land Agency, the demolition of substandard structures and replacement with low density apartment houses should be encouraged. The district would not be an apartment house district as contemplated under the General Residence (R-5) Districts since the conversion of existing structures will be controlled by a minimum lot area per family requirement.

* * * *

3104.3 The following uses are permitted as a matter of right:

* * * *

3104.36 Rooming house.

* * * *

3104.5 The following accessory uses or accessory buildings incidental to the above uses are permitted:

3104.51 Any accessory use or accessory building permitted in R-3 Districts under paragraph 3103.5 of this Article.

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#5-419 (25:537) Use of Existing Buildings—Restrictions of Use Discretion of Zoning Commission—Extension of Use

The lawful use of a building or premises as existing and lawful at the time of the original adoption of any regulation heretofore adopted under the authority of section 5-412, or, in the case of any regulation adopted after June 20, 1938, under sections 5-413 to 5-428, at the time of such adoption, may be continued although such use does not

conform with the provisions of such regulation, provided no structural alteration, except such as may be required by law or regulation, or no enlargement is made or no new building is erected. The Zoning Commission may in its discretion provide, upon such terms and conditions as may be set forth in the regulations, for the extension of any such nonconforming use throughout the building and for the substitution of nonconforming uses. (June 20, 1938, 52 Stat. 798, ch. 534, #7).

#5-420 (25:538) Board of Zoning Adjustment—Creation, Membership—Tenure—Regulations of Govern Organization and Procedure—Appeal—Procedure, Powers—Majority Vote Necessary

A Board of Zoning Adjustment is hereby created which shall be composed of five members appointed by the Commissioners of the District of Columbia, namely, one member of the National Capital Park and Planning Commission or a member of the staff thereof to be designated in either case by such commission; and three other members, each of whom shall have been a resident of the District of Columbia for at least three years immediately preceding his appointment and at least one whom shall own his home.

* * * *

Upon appeals the Board of [Zoning] Adjustment shall have the following powers:

* * * *

(3) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations **or by reason of** exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under sections 5-413 to 5-428 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from

such strict application to as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

* * * *

Federal Administrative Procedure Act
60 Stat. 237, 5 U.S.C.A. 1001

SECTION 5. ADJUDICATION

(c) Separation of functions.

. . . No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as a witness or counsel in public proceedings.